Supreme Court, U.S.
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No. 98-357

In The

Supreme Court of the United States

October Term, 1997

ROSLYN NADEL,

Petitioner,

vs.

MORRISTOWN FIRE DEPARTMENT, MORRISTOWN POLICE DEPARTMENT, and MORRISTOWN MEMORIAL HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This petition seeks review of the denial of a certification petition to the Supreme Court of the State of New Jersey. The facts of this case are set forth accurately in the New Jersey Appellate Division Decision. App. 11a-18a. In summary, the petitioner, Roslyn Nadel, who suffers from psychomotor epilepsy, experienced a seizure while walking in the Town of Morristown on February 14, 1992. When two Morristown firefighters found her lying in the gutter in apparent distress, they radioed the police, who in turn called an ambulance. As the petitioner attempted to get up, she began to walk into traffic. She was incoherent and did not respond to questions put to her. The firefighters held her until the ambulance came within the next few minutes, and she was then taken to Morristown Municipal Hospital, where she was kept under observation and in restraints for several hours, until her release. Morristown's[1] involvement in this matter was limited to the few minutes when Nadel, in the course of a seizure, was stopped from walking into traffic and put into an ambulance.

Nadel petitions this Court for certiorari, asserting that hers is a case which is representative of discrimination faced by disabled people, in general, and people with epilepsy in particular. She claims that this case gives this Court an opportunity to establish guidelines for vulnerable people such as herself, and assure that firefighters and police officers are properly trained when dealing with epileptics in the course of a seizure.

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1. The complaint names "Morristown Fire Department" and "Morristown Police Department" as defendants. The Fire Bureau and Police Bureau are not independent entities, but divisions within the municipal government of the Town of Morristown. The municipal defendants are hereinafter referred to as "Morristown" or "the Town."

A. The petition misrepresents the Town's actions as forming a pattern of conduct which is so pervasive and so permanent as to constitute a force of law.

The bare facts as stated in the petitioner's complaint do not support a claim of civil rights violation against the petitioner. Insofar as the Town of Morristown was concerned, this case involves a single incident lasting not more than five minutes. The police and firefighters were in no way attempting to take the petitioner into custody, but rather were seeking medical assistance for someone in obvious distress. In an effort to demonstrate that this incident was representative of a pervasive pattern of behavior on the part of the police, petitioner observes that similar incidents occurred in other "public entities." Pet. 7. The actions and activities of police officers in other municipalities have no bearing on petitioner's claim against the Town of Morristown, and cannot be used to support a claim of governmental custom or practice.

In this case there was no arrest, the petitioner was not taken into custody, and there was no evidence of discrimination of any kind. The limited actions of the Town did not give rise to a cause of action, and certainly were not indicative of discrimination against disabled persons.

B. Petitioner misrepresents the actions of the Town by not differentiating between her situation as an individual in medical distress, and the arrest and incarceration of a disabled individual who is "acting strangely."

The petition asserts that the Town's alleged failure to train its police and fire personnel in the area of disabilities, particularly in the area of epilepsy, amounts to discrimination and a violation of her rights under the Americans with Disabilities Act. Pet. 11-14. In quoting the brochure by the

Police Executive Research Forum and Epilepsy Foundation of America: *TAKE ANOTHER LOOK*, with respect to the concerns of the civil rights of epileptics, the brochure states:

> Police officers should always consider the possibility that a disability is involved when faced with impaired responsiveness of behavior that doesn't seem to make sense, or when called to a situation when someone is said to be "acting strangely"
>
> The Americans with Disabilities Act prohibits discriminatory treatment of people with all types of disabilities, including epilepsy. *Taking people into custody solely because of actions or behavior caused by disability deprives them of their rights and may be a violation of the Act.*

(Emphasis added).

By quoting this paragraph in connection with this matter, as well as a similar discussion from the *Americans With Disabilities Act Handbook* and an irrelevant and gratuitous news story about an epileptic wrongly convicted for assault in Virginia (App. 34a-39a) and petitioner attempts to leave the Court with the impression that the police "took her into custody" because she was acting strangely. She then argues that absent adequate training, "this unnecessary abuse will continue." Pet. 14. This clearly misrepresents the facts in this case. She was not arrested or taken into custody. Morristown personnel at the site recognized a medical situation, and attempted to respond to it. The Appellate Division, properly made the following finding:

> . . . (T)he record clearly does not support a finding of "city policy" evidencing a "deliberate

> indifference" on the part of the of the municipality, Morristown. We find nothing in the record to support a municipal policy of deliberate indifference in training police and firefighters to deal with medical emergencies. Indeed, the subject incident seems to have been handled promptly and appropriately, without actionable harm to plaintiff, and clearly without any violation of her federal civil rights. App. 24a.

REASONS FOR DENYING THE WRIT

1. There is no decision in this case involving an important federal question in a way that conflicts with either the decisions of any other state court of last resort or of a United States court of appeals, and thus the criteria set forth in Supreme Court Rule 10(b) are not satisfied. Petitioner cites no cases that would support a conflict of lower court opinions as a basis for granting the petition. Insofar as the case presented against the Town is concerned, it involves an isolated incident. Petitioner presents no evidence that there are individuals within the Town of Morristown who are suffering seizures on a regular basis, and that either as a matter of practice or formal policy, police officers and firefighters are wantonly and recklessly treating such people improperly. Nor has she demonstrated that, assuming such wanton or reckless treatment, there are no legal remedies available. The Town submits that she would have to present the Court with a scenario of that magnitude, and demonstrate that the New Jersey courts differed in their treatment of such cases from other state or federal courts, in order to satisfy the requirements of Supreme Court Rule 10(b).

2. The Appellate Division of the Superior Court of New Jersey properly found that there was no basis to support a claim under 42 U.S.C. § 1983 or the Americans with Disabilities Act

and the Rehabilitation Act of 1973. The petition presents no important question of federal law that should be addressed by this Court pursuant to Supreme Court Rule 10(c). The Appellate Division correctly found that in this case there was no cause of action stated pursuant to federal civil rights legislation, to the Americans with Disabilities Act and the Rehabilitation Act of 1973.

The language of 42 U.S.C. § 1983 states in pertinent part as follows:

> Every person who, **under color of any statute, ordinance, regulation, custom or usage** of any State or Territory of the District of Columbia, subjects or causes to be suggested, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges, or immunities secured by the Constitution and laws** shall be liable to the party injured in the action at law, in equity, or any other proper proceeding for redress.

(Emphasis added).

In order to make a *prima facie* claim under 42 U.S.C. § 1983 petitioner must first allege that there is some law or regulation that the public entity adopted that operated to injure the plaintiff by depriving her of her rights under the Constitution. In the absence of a formal law or regulation, she must demonstrate that the custom or usage was so pervasive and so permanent as to constitute force of law. *Monell v. New York City Dept. of Social Services et al.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1977). The failure to train can constitute a violation of 42 U.S.C. § 1983 "only where the failure to train amounts to a deliberate indifference to the rights

of persons with whom the police come into contact." *Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). This pleading is necessary, because in the absence of a proven policy which violates the plaintiff's rights, the municipality will not be held liable merely because it employs a tortfeasor who may have violated the plaintiff's rights. The Court in *Monell* and *Canton* specifically rejected a *respondeat superior* theory of liability on the part of the municipality.

The Supreme Court in *Canton* addressed the issue of when lack of training constitutes "deliberate indifference." *Canton* involved the arrest of the plaintiff, who was apparently incoherent at the time of processing. When asked if she needed medical attention, plaintiff did not give a coherent response. Her behavior included slumping to the floor several times, until finally the police placed her on the floor to keep her from falling. No medical help was summoned. Within an hour of taking her into custody, the family was summoned and the plaintiff was released to the family's care and taken by ambulance to the hospital. The plaintiff, who was apparently suffering from severe emotional problems, was then hospitalized for a week and received outpatient treatment for a year thereafter.

Subsequent to her release, the plaintiff filed suit against the City of Canton, asserting that the municipal regulation authorizing shift commanders, in their sole discretion, to determine whether a detainee needed special medical care in the event that he or she was unconscious or semi-conscious, or unable to explain his or her condition, violated her constitutional rights under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical care while in police custody.

In determining whether or not an absence of training constitutes deliberate indifference to the rights of the inhabitants

of Canton to the point where such shortcoming could be thought of as a policy of custom, the Supreme Court held that one must determine whether the training program is adequate, and if not, whether the inadequacy represents city policy. The Court observed:

> In resolving the issue of a city's liability, the focus must be on the adequacy of the training in relation to the tasks the particular officer must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. [citations omitted]. . . . Neither will it suffice to prove that an injury or accident could have been avoided if an officer had better or more training to equip him to avoid the particular injury-causing conduct. **Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.** And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

Canton v. Harris, 489 U.S. 378, 390-391 (emphasis added).

Applying this standard, the Appellate Division properly found that the facts alleged simply did not support a finding of liability on the part of the Town of Morristown under a § 1983 claim. Petitioner presented no facts that supported the unsubstantiated claim of inadequate training. No facts even addressed the existence or non-existence of any policy or

practice within the Town of Morristown to support such a claim. Thus, even if, *arguendo*, the petitioner could somehow show that the firefighters and police acted improperly, such actions were at worst an error in judgment, a case of "adequately trained officers who occasionally make mistakes," and not a violation of petitioner's civil rights. There is no evidence that the incident that occurred on February 14, 1992 was anything more than an isolated event. There is simply no legal or factual basis to conclude that petitioner was a victim of discrimination, by virtue of her disability or for any other cause.

On this record, the New Jersey courts properly found that summary judgment against the petitioner should be affirmed, applying the standard set forth in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 666 A.2d 146 (1995). Clearly, no novel legal issues were presented warranting this Court's consideration, or the granting of the petition.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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